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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GERALD JAY WILSON, Defendant and Appellant.	B266967 (Los Angeles County Super. Ct. No. BA119207)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Law Offices of Susan L. Jordan and Susan L. Jordan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Petitioner Gerald Jay Wilson is currently serving a "Three Strikes" sentence of 25 years to life for possession of paraphernalia in jail (Pen. Code, § 4573.6).[1] Following the passage of the Three Strikes Reform Act (Proposition 36), he petitioned for resentencing under section 1170.126. The trial court found that Wilson was eligible for resentencing based on current and past offenses, but denied the petition on the ground that resentencing him would "pose[] an unreasonable risk of danger to public safety."

While the petition was pending, the voters adopted the Safe Neighborhoods and Schools Act (Proposition 47 or section 1170.18). Wilson now argues on appeal that Proposition 47's definition of "unreasonable risk of danger to public safety" applies to dangerousness determinations under Proposition 36. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In December 1995, a jury convicted Wilson of possession of paraphernalia in jail (§ 4573.6). The jury also found that Wilson had previously suffered three prior convictions for first degree burglary, two prior convictions for robbery with great bodily injury, and a prior conviction for robbery. Wilson was sentenced to 25 years to life pursuant to the Three Strikes law (§§ 667 & 1170.12). We affirmed the judgment. (See *People v. Wilson* (B102159; filed on April 25, 1997 [nonpub. opn.].)

In December 2012, Wilson filed a petition for resentencing under Proposition 36. He argued that he was eligible and resentencing would not pose an unreasonable risk of danger to

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[1] All further statutory references are to the Penal Code unless otherwise stated.

public safety. The People opposed the motion, arguing that resentencing Wilson would pose an unreasonable risk of danger to public safety based on his violent criminal history, prison misconduct, and lack of rehabilitative programming. Wilson filed a reply arguing that based on his age (55 years old), the remoteness of his criminal offenses, his substantially compliant behavior in prison over the past 20 years, and his post-release plans, he did not pose an unreasonable risk of danger to public safety.

On June 2, 2015, the court held a hearing and heard evidence and argument regarding the petition. The People submitted evidence of Wilson's criminal history and disciplinary record while incarcerated. The trial court denied the petition after finding that resentencing petitioner would pose an unreasonable risk of danger to public safety. In support of this finding, the court cited to Wilson's "history of recidivism, serious misconduct in prison, and lack of meaningful self-help programming." Wilson timely appealed.

CONTENTIONS

Wilson contends that Proposition 47's definition of an "unreasonable risk of danger to public safety" applies to dangerousness determinations under Proposition 36, and the trial court erred in not considering his petition under this definition.[2]

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[2] In the reply, for the first time, Wilson raises the argument that "[w]ithout the limitations imposed by Proposition 47, the phrase 'unreasonable risk of danger to public safety' is void for vagueness." It is well-settled law that " '[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument.' [Citation.]" (*Reichardt v.*

DISCUSSION

1. *Statutory Interpretation*

The issues raised by Wilson require us to interpret Proposition 36 and Proposition 47. " 'In interpreting a voter initiative . . . we apply the same principles that govern statutory construction. [Citation.] Thus, "we turn first to the language of the statute, giving the words their ordinary meaning." [Citation.] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. [Citation.] When the language is ambiguous, "we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." [Citation.]' [Citation.] In other words, 'our primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure.' [Citation.]" (*People v. Briceno* (2004) 34 Cal.4th 451, 459.) When the language is not ambiguous, the plain meaning of the statutory language controls, unless it would lead to absurd results the electorate could not have intended. (*People v. Birkett* (1999) 21 Cal.4th 226, 231.) Furthermore, although courts may not generally rewrite a statute's unambiguous language, a word that has been erroneously used may be subject to judicial correction in order to best carry out the intent of the adopting body. (*People v. Skinner* (1985) 39 Cal.3d 765, 775.)

Hoffman (1997) 52 Cal.App.4th 754, 764.) However, we note that *People v. Garcia* (2014) 230 Cal.App.4th 763 has persuasively addressed and rejected this argument.

2. *Proposition 36*

"Prior to its amendment by [Proposition 36], the Three Strikes law required that a defendant who had two or more prior convictions of violent or serious felonies receive a third strike sentence of a minimum of 25 years to life for any current felony conviction, even if the current offense was neither serious nor violent. (Former §§ 667, subds. (d), (e)(2)(A), 1170.12, subds. (b), (c)(2)(A).) [Proposition 36] amended the Three Strikes law with respect to defendants whose current conviction is for a felony that is neither serious nor violent. In that circumstance, unless an exception applies, the defendant is to receive a second strike sentence of twice the term otherwise provided for the current felony, pursuant to the provisions that apply when a defendant has one prior conviction for a serious or violent felony. [Citations.]" (*People v. Johnson* (2015) 61 Cal.4th 674, 680–681, fn. omitted.)

"[Proposition 36] also created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)" (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 168.)

In determining whether the petitioner would pose an unreasonable risk of danger to public safety, "the court may consider: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the

remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

Proposition 36 became effective on November 7, 2012. (See *People v. Brown* (2014) 230 Cal.App.4th 1502, 1507; Cal. Const., art. II, § 10, subd. (a).) Under section 1170.126, a petition for resentencing must be filed within two years of Proposition 36's enactment "or at a later date upon a showing of good cause . . . ." (§ 1170.126, subd. (b).)

3. *Proposition 47*

Proposition 47 was passed by California voters on November 4, 2014, effective November 5, 2014. (See *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) The stated "[p]urpose and [i]ntent" of Proposition 47 include, among other things, "[r]equir[ing] misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes"; "[a]uthoriz[ing] consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors"; and "[r]equir[ing] a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, subd. (3), (4) & (5), p. 70.)

Proposition 47 created a new resentencing provision, section 1170.18, under which "[a] person . . . [currently] serving a sentence for a conviction, whether by trial or plea, of a felony or

felonies who would have been guilty of a misdemeanor under the act that added this section . . . had this act been in effect at the time of the offense may petition for a recall of sentence" and request resentencing. (§ 1170.18, subd. (a).)

"If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. In exercising its discretion, the court may consider all of the following: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes. [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated. [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

In contrast to Proposition 36, which does not define the term "unreasonable risk of danger to public safety," Proposition 47 provides that "[a]s used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of [section 667, subd. (e)(2)(C)(iv)]." (§ 1170.18, subd. (c).) Section 667, subdivision (e)(2)(C)(iv) lists the following felonies, sometimes called "super strike" offenses: "(I) A 'sexually violent offense' . . . . [¶] (II) Oral copulation . . . as defined by Section 288a, sodomy . . . as defined by Section 286, or sexual penetration . . . as defined by Section 289. [¶] (III) A lewd or

lascivious act . . . in violation of Section 288. [¶] (IV) Any homicide offense, including any attempted homicide offense . . . . [¶] (V) Solicitation to commit murder . . . . [¶] (VI) Assault with a machine gun on a peace officer or firefighter. . . . [¶] (VII) Possession of a weapon of mass destruction. . . . [¶] (VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death."

4. *Proposition 47's Definition of an "Unreasonable Risk of Danger to Public Safety" Does Not Apply to Proposition 36*

Wilson contends that Proposition 47's narrow definition of "unreasonable risk of danger to public safety" controls the meaning of that term as used in Proposition 36. Specifically, Wilson notes that Proposition 47 says, "[*a*]*s used throughout this Code*, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony." (§ 1170.18, subd. (c), italics added.) He argues that by using the phrase "[a]s used throughout *this Code*," Proposition 47 imports its definition of "unreasonable risk of danger to public safety" into the entire Penal Code, including, as relevant here, into section 1170.126, subdivision (f).

Many appellate courts have considered whether Proposition 47's definition of "unreasonable risk of danger to public safety" applies to resentencing under Proposition 36, and the issue currently is pending before the California Supreme Court. (See, e.g., *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted February 18, 2015, S223825; *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted February 18, 2015, S223676; *People v. Florez* (2016) 245 Cal.App.4th 1176, review granted June 8, 2016, S234168; *People v. Myers* (2016) 245 Cal.App.4th 794, review granted May 25, 2016, S233937;

People v. Garcia (2016) 244 Cal.App.4th 224, review granted April 13, 2016, S232679; *People v. Lopez* (2015) 236 Cal.App.4th 518, review granted July 15, 2015, S227028.) We conclude, consistent with the majority of courts to have considered this issue, that Proposition 47's definition of "unreasonable risk of danger to public safety" does not apply to Proposition 36.

"We recognize the basic principle of statutory and constitutional construction which mandates that courts, in construing a measure, not undertake to rewrite its unambiguous language. [Citation.] That rule is not applied, however, when it appears clear that a word has been erroneously used, and a judicial correction will best carry out the intent of the adopting body. [Citation.] . . . . Whether the use of [a particular word] is, in fact, a drafting error can only be determined by reference to the purpose of the section and the intent of the electorate in adopting it." (*People v. Skinner*, *supra*, 39 Cal.3d at pp. 775–776.)

For the reasons that follow, we conclude that the voters erroneously used the word "Code" in section 1170.18, subdivision (c), rather than the word "Act," and that this error is properly subjected to judicial correction. Specifically, as we now discuss, we believe the voters intended in section 1170.18, subdivision (c) to refer to Proposition 47, not to the entire Penal Code. We therefore conclude that the passage of Proposition 47 did not alter Proposition 36 or section 1170.126.

First, Proposition 47's ballot materials and statutory language do not indicate that the definition of "unreasonable risk of danger to public safety" would extend beyond Proposition 47 itself. To the contrary, subdivision (n) states, "Nothing in this and related sections is intended to diminish or abrogate the finality of judgments *in any case not falling within the purview of*

this act." (§ 1170.18, subd. (n), italics added.) If a court ruling on a Proposition 36 petition must grant the petition unless it finds an unreasonable risk the petitioner will commit a "super strike" under the restrictive definition provided by section 1170.18, subdivision (c), the finality of the underlying judgment may be "diminish[ed]" even though the case does not "fall[] within the purview of [Proposition 47]." (*Id.*, § 1170.18, subd. (n).)

Likewise, the official title and summary, legal analysis, and arguments for and against Proposition 47 nowhere suggest that Proposition 47 will have an impact on Proposition 36. (Voter Information Guide, *supra*, pp. 34–39.) The ballot materials do not, for example, say that Proposition 47 will severely restrict the ability of courts to reject resentencing petitions under Proposition 36. Rather, the ballot materials emphasize that the resentencing provisions of Proposition 47 will affect only those persons serving sentences for specified nonserious, nonviolent property or drug crimes. Accordingly, nothing in Proposition 47's ballot materials suggests that the initiative will affect resentencing under Proposition 36.

Furthermore, Propositions 36 and 47 have different purposes. Proposition 36 is designed to reduce penalties for individuals with two or more prior serious or violent felony convictions, whose current conviction is also a felony. By contrast, Proposition 47 is intended to reduce penalties for low-level offenders who have committed "certain nonserious and nonviolent property and drug offenses." (Voter Information Guide, *supra*, p. 35.)

The wording of section 1170.18, subdivision (c) is also inconsistent with an intent to apply that subdivision throughout the entire Penal Code. Subdivision (c) refers to the "petitioner," a

term that is used throughout Proposition 47 to refer to persons petitioning under "this section" or "this act." (See § 1170.18, subds. (a), (b), (c), (j), (l), & (m).) Accordingly, subdivision (c)'s use of the term "petitioner" suggests that the term is limited to individuals petitioning under that particular act. (*Id.*, § 1170.18, sub. (c).)

Lastly, the timing of Proposition 47 is inconsistent with an intent to affect Proposition 36 petitions. Proposition 36 required defendants to file petitions within two years from its enactment absent a showing of good cause for a late petition. (§ 1170.126, subd. (b).) Proposition 47 was enacted with only two days remaining in the two-year period for filing Proposition 36 petitions. A rational voter would not have understood Proposition 47 to change the rules for Proposition 36 petitions when the period for filing such petitions had almost expired.

On these grounds, we conclude that section 1170.18, subdivision (c) contains a drafting error—the use of the word "Code"—that must be judicially corrected to read "Act." As so read, Proposition 47's definition of "unreasonable risk of danger to public safety" does not apply to Proposition 36.

DISPOSITION

The order is affirmed.

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EDMON, P. J.

We concur:

LAVIN, J.

GOSWAMI*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.